

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Re:	:	Case No. 12-51683
	:	
KBT Freight, Inc.	:	Chapter 7
	:	Judge John E. Hoffman, Jr.
Debtor.	:	

**TRUSTEE’S MOTION FOR APPROVAL OF REJECTION
OF LEASE OF NON-RESIDENTIAL REAL PROPERTY**

Larry J. McClatchey, Trustee, moves the Court to enter an order approving his rejection of a nonresidential real property lease under which KBT Freight, Inc., Debtor, is Lessee and Miller Investments Co. and Profile Investments Co. (“Miller Profile”) is Lessor. Trustee represents as follows:

1. This case was commenced by a voluntary petition seeking relief under chapter 11 of the Bankruptcy Code on February 29, 2012 (“Petition Date”).

2. On April 13, 2012, the Court entered its *Order Converting Case to Chapter 7* [Doc. 83].

3. On June 1, 2011, the Debtor, as Lessee, entered into a written lease with Miller Profile as Lessor (the “Lease”) with regard to certain nonresidential real property consisting of approximately 8,160 square feet of a building located at 8720 Orion Place¹, Suite 250, Columbus, Ohio (the “Leased Premises”). A copy of the Lease is attached to the *Motion of Patrick J.J. Kelley to Compel Payment of Administrative Rent Pursuant to 11 U.S.C. §365(d)(3), 503(b) and 507(a)* filed March 15, 2012 [Doc. #32].

¹ Trustee has determined that the address of the Debtor on the original petition is incorrect. Debtor’s office is at 8720 Orion Place, not 8270 as listed on the petition. Trustee has asked Debtor’s former counsel to correct the record.

4. Trustee has been advised and believes that Debtor has ceased all business operations and no longer requires the use of the Leased Premises to conduct its business. Trustee is informed and believes that there is some equipment, furniture and fixtures, business records and other personal property in the Leased Premises (“Estate Property”) which Trustee is attempting to administer and will be removed from the Leased Premises as soon as practicable.

5. Trustee is seeking approval of his rejection of the Lease to reduce or eliminate the liability of the chapter 7 estate for rents and other charges due under the Lease.

Memorandum of Law

The Trustee, subject to the Court’s approval, may assume or reject an unexpired lease of the debtor, 11 U.S.C. §365(a). The Trustee’s decision to reject an unexpired lease of nonresidential real property is reviewed by the Court under the “business judgment standard”, *In re B.I. Industries*, 204 F3d. 1276(9th Cir. 2000); *In re Klein Sleep Products*, 78 F.3d 18 (2nd Cir. 1996). Moreover, §365(d)(3) provides that the Trustee “...shall timely perform all the obligations of the Debtor...arising from and after the order for relief under any unexpired lease of non-residential real property, until such lease is assumed or rejected...”.

Trustee submits that the business judgment of Trustee in rejection of the unexpired lease is sound. Debtor has ceased operations and no longer has a need for the office space. Moreover, on April 13, 2012, immediately before converting the case, the Court entered its *Order Granting Motion of Patrick J. J. Kelley for Relief from Stay* [Doc. 82]. Thus, Lessor has now been granted permission to exercise its rights under state law with regard to the Lease Premises. Trustee has no discernible defense to a forcible entry and detainer action. There are no funds in the estate with which Trustee could cure the existing payment and other defaults under the Lease.

Finally, Trustee requests that rejection should be approved *nunc pro tunc* to the date of the filing of this Motion. A bankruptcy court may approve a rejection of a nonresidential lease by the Trustee retroactive to the date the Trustee moved to reject the lease, *In re Thinking Machines Corp.*, 67 F.3d 1021 (1st Cir. 1995). To reduce or eliminate administrative expenses, it is necessary that rejection be deemed to have occurred at the earliest possible date. Trustee is making arrangements to surrender possession of the property to Landlord and will do so at or before the entry of an order approving rejection.

WHEREFORE, after noticed and a hearing, Trustee moves the Court to enter an order approving rejection of the unexpired lease of nonresidential real property, *nunc pro tunc* to the date of the filing of this Motion, and for such other or further relief to which Trustee may be entitled.

s/ Larry J. McClatchey

Larry J. McClatchey (0012191)
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Trustee and Attorney for Trustee

NOTICE AND CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that Larry J. McClatchey, Trustee filed a motion seeking approval of rejection of office lease.

PLEASE TAKE FURTHER NOTICE that your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this Bankruptcy case. If you do not have an attorney, you may wish to consult one. If you do not want the Court to grant the relief requested, then on or **before twenty-one (21) days from the date set forth in the certificate of service for the motion or objection** ("Response Date"), you must file with the court a response explaining your position by mailing your response by regular US Mail to the Clerk of the United States Bankruptcy Court, 170 North High Street, Columbus, Ohio 43215 OR

your attorney must file a response using the court's ECF System. The court must receive your response on or before the Response Date.

You must also send a copy of your response on or before the Response Date by 1) the Court's ECF System or 2) by regular US Mail to Trustee's counsel, Larry J. McClatchey, Kegler Brown Hill & Ritter, 65 East State Street, Suite 1800, Columbus, Ohio 43215. If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the Motion and may grant the motion or objection and may enter an order granting that relief.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing *Motion for Approval of Rejection of Office Lease* was sent electronically or by ordinary United States mail, as shown below, to the following listed persons, on April 18, 2012.

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/s/ Larry J. McClatchey
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